No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

Motion to Dismiss, Return and Answer and Respondent's Brief.

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FOR THE NINTH CIRCUIT

In the Matter of the Application of

MELVILLE C. WILLIAMS,

for Writ of Mandamus.

Motion to Dismiss Petition for Writ of Mandamus and to Discharge the Rule to Show Cause Why Order Revoking Special Admission of Melville C. Williams to Practice in Respondent Court for One Cause Only Should Not Be Vacated.

The Respondents James M. Carter, District Judge of the United States District Court for the Southern District of California and the other judges and officers of said United States District Court, appearing by counsel, move the Honorable United States Court of Appeals for the Ninth Circuit to dismiss the petition for writ of mandamus, and to discharge the rule to show cause, upon the following grounds:

1. That said petition and exhibits presented therewith do not state sufficient facts to show that Petitioner is entitled to a writ of mandamus.

2. The petition is incomplete in that it does not contain and is not accompanied by all of the pleadings, transcript of hearings, pre-trial conferences, motions, rec-

ords of proceedings in the Respondent Court, evidence, records, files, or exhibits which were in the record and before the Court and considered by it when it heard the Petitioner and made the order of July 26, 1955, filed July 27, 1955, vacating the minute order dated June 16, 1952, specially admitting Petitioner Melville C. Williams to practice in the Respondent Court for the purpose of the cause of *Winckler v. Sunkist, Inc., et al.,* only. The petition contains matter not in the records, files, or transcript of said case.

3. Petitioner has a plain and adequate remedy under and by virtue of the appeal, filed on August 24, 1955, by Petitioner, which is now pending, in said cause from the order of Respondent Court made July 26, 1955, and filed July 27, 1955, vacating said minute order specially admitting said Petitioner to practice in the Respondent Court for said cause only.

4. The petition, exhibits, files, and record of proceedings in this matter show the exercise of sound judicial discretion by the Respondent Court in the conduct of the hearings and the making of its order revoking the limited permission to participate in said cause then pending before the Court in that:

(a) The order was made only as a result of hearings after actual notice in open court on June 1, 1955, and June 2, 1955, and both oral and documentary evidence was given by Petitioner and received by the Respondent Court in the hearings of said matter.

(b) Said oral and documentary evidence was offered and arguments were made by members of the Bar of Respondent Court acting on behalf of Petitioner in his presence and in open court.

(c) Petitioner, by causing repeated costly delays, splitting the issues, failure to timely advise the Court that it was never his intention to try the cause but that other attorneys were to be brought in for that purpose, failure to advise the Court until May 27, 1955, that he intended to move to dismiss, when defendants' time to so move had expired January 14, 1955, failure to simplify the trial by entering into reasonable stipulations, and conduct, actions, omissions, and attitude at pre-trial conferences and hearings, showed deliberate disregard or ignorance of Rule 16, Federal Rules of Civil Procedure, and Rule 9 of the Respondent Court so as to seriously interfere with the administration of justice in and offend the dignity and purpose of such Court.

(d) Said order was based on matters occurring in the presence of the Court.

(e) No prejudice or injury could result to any litigant because each was represented by local counsel who are members of the State Bar of California and the Bar of the Respondent Court, and by two other members of Petitioner's law firm, who were always the intended trial attorneys in the cause.

5. The questions raised by the petition for writ of mandamus are moot since the Respondent Court granted motions of Ferris E. Hurd and Thomas C. Strachan, Jr., for permission to appear and participate in the trial of the cause on behalf of the party previously represented by Petitioner (in addition to the local counsel for said party) under and by virtue of the provisions of Rule 1(e) 5 of the Rules of the United States District Court for the Southern District of California.

Wherefore, Respondents pray that the petition for writ of mandamus be denied and dismissed and the rule directed to Respondents herein to show cause be dissolved and discharged.

Dated: November 2, 1955.

Wm. Howard Nicholas,

Attorney for Repondents by Appointment Pursuant to a Resolution of the Los Angeles Bar Association.

No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
MELVILLE C. WILLIAMS,
for Writ of Mandamus.

RETURN AND ANSWER TO PETITION FOR WRIT OF MANDAMUS.

Respondent James M. Carter, Judge of the United States District Court for the Southern District of California, and the other judges and officers of said United States District Court for the Southern District of California, without waiving the motion to dismiss filed concurrently herewith, for return and answer to the order to show cause and petition for writ of mandamus herein state as follows:

1. That the petition contains allegations and statements respecting questions of fact and interpretations of law which are or may be, pending before the Respondent Court and the Respondent Judge, who is presiding in the action of *Winckler & Smith Citrus Products Co., a corporation v. Sunkist Growers, Inc., a corporation, et al.,* No. 13788, pending before said Respondent Court, which the Respondents may be called upon to find, determine, and decide in disposing of said case. It would be inappro-

priate for the Respondents to make any answer to or comments upon the allegations of said petition in said particulars, and for said reason the Respondents neither admit nor deny the allegations of said petition with respect to Petitioner's statements of said alleged facts and interpretation of the law in said particulars.

2. That said petition and exhibits filed therewith are incomplete and do not contain, but omit, other pleadings, motions, proceedings, and the evidence which was before the Respondent Court at the time that it heard and ruled upon the matter of vacating the minute order dated June 16, 1952, granting Petitioner Melville C. Williams permission to practice before the Respondent Court for the purpose of the above-named case of *Winckler v. Sunkist* only; and that the ruling of the Respondent Court was made and based upon the entire record before it and all of the proceedings in said case, which record, Respondents assert, is necessary and material in determining whether said minute order should or should not have been revoked. Respondents further state that the order revoking permission for Petitioner to practice in said case was further based upon the acts, omissions, conduct, and attitude of Petitioner before the Respondent Court on pre-trial conferences and hearings in said case.

3. Answering paragraph 4 of the petition, Respondents state that Petitioner understood that he enjoyed permission, pursuant to Rule 1 of the Rules of the United States District Court for the Southern District of California, merely to appear and participate in the particular case of *Winckler v. Sunkist* only, and that such permission was a limited one. Respondents deny generally and specifically the allegations of paragraph 4.

4. Answering paragraph 5 of the petition, Respondents state that the order dated July 26, 1955, and filed July 27, 1955, merely vacated and set aside the limited purpose order permitting Petitioner to appear and participate in said case, and deny that said order dated July 26, 1955, summarily revoked said prior order of June 16, 1952, and deny that said order dated July 26, 1955, was made without due notice to the Petitioner or a fair hearing in open court; and allege in this connection that the proceedings which resulted in said order dated July 26, 1955, commenced on June 1, 1955, and were continued to June 2, 1955, on which date additional hearings were had and at which time evidence, both oral and documentary, was offered and received by the Court, and the Petitioner was in court and represented by Donald D. Stark and Ross G. Fisher at said hearing, and that the Respondents did not hear any objection to the proceeding with the hearing on the evidence presented, and with the counsel then in court, until the Respondent Court had indicated that it was about to rule unfavorably to the Petitioner. Respondents further allege that Petitioner did not comply with all of the orders of said District Court in connection with his representation of Exchange Lemon Products Co., one of the defendants in said case, and was told by the Respondent Court that he and his client were in default at a pre-trial conference and hearing on the 10th day of May, 1954. (App. 28-31.)

5. Answering paragraph 6, Respondents deny that Petitioner has endeavored at all times to comply with the orders of the said District Court and/or to cooperate with counsel for the plaintiff and intervener therein.

6. Answering paragraph 8, Respondents deny that Petitioner and his said firm had been hindered in their

efforts to prepare said case for trial by the consistent refusals of the plaintiff or the intervener of their attorneys, or by refusals of the process of Respondent Court, for discovery under Rule 37, Federal Rules of Civil Procedure, or under Rule 32 for answers to interrogatories; deny that plaintiff has repeatedly or otherwise refused to describe or limit or define the conspiracy or conspiracies, or the attempts to monopolize or the monopoly or monopolies, or the violations of the Robinson-Pattman Act or the California statutes, alleged in its complaint. Allege that plaintiff has done so in other ways than the amended complaint and refers this Court specifically to Court's Ex. 1 (App. 118-128), dated March 10, 1955. Allege in such connection that Petitioner pursued a course of conduct and strategy of splitting and multiplying issues that obstructed the orderly pre-trial procedure in the Respondent Court, and that Petitioner further refused to stipulate to any material facts on the issues in said action except paragraph 1 of a proposed stipulation submitted by the attorneys for the plaintiff in said action, which paragraph merely recited that plaintiff was a corporation organized under the general corporation laws of California on October 29, 1945, and that it operated a plant for processing citrus product fruit into citrus juices and other citrus fruit products at Anaheim, California.

7. Answering paragraph 9 of the petition, Respondents state that Petitioner failed to cooperate with the plaintiff or the Respondent Court in requests and motions for discovery of documents in the possession and control of defendant Exchange Lemon Products Co.; that on the occasion of the pre-trial conferences and hearings, which began May 26, 1955, Petitioner for the first time,

on May 27, 1955, indicated his desire to file a dilatory plea in the form of a motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted (App. 36), and Petitioner also indicated the desire to make a motion for summary judgment (App. 37), although prior motions and dilatory pleas had been filed and argued theretofore, consisting of motions to strike and motions for a more definite statement, and defendants' time to so move had expired January 14, 1955. [See Affidavit of James M. Carter.]

8. Answering paragraph 11, Respondents deny that Petitioner, at pre-trial conferences, attempted to or did comply with the directions of the Court or cooperated with opposing counsel; deny that the Court for the first time indicated its annoyance over the position taken by Petitioner or with Petitioner on May 27, 1955. Allege that on May 10, 1954, more than one year previous, the Court directed that a finding be made that Petitioner's client was in default of an order of the Court (App. 31), but later chose to withdraw the order, or direction (App. 32). Allege that the default was directly occasioned by the actions and directions given by Petitioner to his co-counsel. (App. 32.)

9. Answering paragraph 12, Respondents deny that Petitioner and his firm attempted in good faith to agree with opposing counsel on stipulations of fact, but allege that Respondent Court was convinced, from the statements and conduct of Petitioner in the various proceedings before it and from the evidence, both oral and documentary, introduced at the hearings on June 1 and June 2, 1955, and from the prior dilatory pleas and motions under Rules 32, 34 and 37, that Petitioner's technique and purpose was one of attrition and delay calculated to

exhaust his opponents and hinder and delay the ordinary judicial processes in the Respondent Court.

10. Answering paragraph 13, Respondents admit that Petitioner advised Respondent Court for the first time May 27, 1955, that it was intended that Ferris E. Hurd appear for defendants as chief counsel for the purpose of the trial, and allege in this connection that Petitioner stated in open court that he knew from the beginning that Petitioner was not going to be the chief trial counsel. In this connection, Respondents allege that a motion and order have since been made admitting said Ferris E. Hurd and Thomas C. Strachan, Jr., under said Rule 1, giving them Special permission to practice before the Respondent Court in this case, representing all the defendants named therein, including Exchange Lemon Products Co., the nominal client represented by Petitioner. [See minutes of Court attached to Affidavit of James M. Carter.] The Respondents further state that, in addition to said Ferris E. Hurd and Thomas C. Strachan, Jr., and the Petitioner, Clayson, Stark & Rothrock and Donald D. Stark are also named as attorneys for defendant Exchange Lemon Products Co.

11. Answering paragraph 15, Respondents deny that the Court's conclusions on the crucial issue of attrition were largely influenced by the matters alleged by Petitioner; instead, Respondents rely on the whole record of the case.

12. Answering paragraph 17 of the petition, Respondent Court admits that it denied a request for a further continuance from June 2, 1955, on the hearing of the revocation of the order dated June 16, 1952, granting Petitioner special permission to appear and participate

in said case of *Winckler v. Sunkist,* and alleges in this connection that Petitioner's request was for time to present witnesses to present to the Court "the full picture of what occurred and how much was accomplished during the negotiations for the stipulation," and denies that Petitioner was refused any request to present witnesses and other evidences of his "good faith," and Respondent Court alleges that a full and fair hearing was had upon the question of whether Petitioner's said permission should be revoked, and that evidence, both oral and documentary, and arguments of counsel were made on behalf of Petitioner prior to Respondent Court's ruling and ordering the revocation of Petitioner's special permission to so appear and practice in said case.

13. Answering paragraph 18 of the petition, Respondent Court alleges that the findings of fact objected to in paragraph 8, namely, that said Petitioner, Melville C. Williams, has engaged in practices of "attrition and delay in representing defendant, Exchange Lemon Products Co., which have interfered with the expeditious preparation of the within case for trial," and that "the delay and tactics and practices of attrition of Melville C. Williams have interfered with the administration of justice and the expeditious trial of the within case," are based upon the judgment and opinion of the Respondent Court obtained from all of the records, docket, files, documents, exhibits, oral evidence, papers, and proceedings in the case, and from the actions, omissions, attitude, and demeanor of the petitioner at the hearings and conferences in connection with said action.

14. Answering paragraph 19 of the petition, Respondents allege that the order revoking Petitioner's permis-

sion to appear and participate in said case was made upon just and aggravated cause being shown therefor and misconduct justifying said action; that Petitioner's absence from the State on all but eighty-seven days of the period of over three years while this action has been pending deprived the Court and counsel of adequate control over the case that was necessary to obtain its expeditious preparation, trial, and disposition.

15. Answering paragraph 20 of the petition, Respondents deny that said order dated July 26, 1955, and filed July 27, 1955, was made without due notice or fair opportunity to be heard, but allege in this connection that a full and fair hearing was held and was continued from June 1 to June 2, and on June 2 Petitioner was represented by counsel of his own choosing and offered evidence, both oral and documentary.

16. Answering paragraph 22 of the petition, Respondents state that the order was just and proper and within the legal power and jurisdiction of the Court to make, and allege that it was made with and after due notice and that Petitioner had and was given a full and fair opportunity to be heard and that Petitioner was so heard.

17. Answering paragraph 23 of the petition, Respondents state that said order complained of was correct and proper and constituted an exercise of sound judicial discretion on the part of this Court, and that it was made for just and reasonable cause, upon sufficient and aggravated grounds.

18. Answering paragraph 24 of the petition, Respondents state that Petitioner's remedy on the appeal which he has heretofore taken from said order complained of, and which appeal is now pending, is a full, adequate, and

complete remedy in that other counsel have been brought into the case to act as chief trial counsel in place of Petitioner and that no prejudice will result to Petitioner or his said client on the order complained of, even if the appeal be heard after the trial in said action of *Winckler v. Sunkist* be completed. Respondents further state that Petitioner, by virtue of the Rules of the United States District Court of the Southern District of California, Rule 1(e)5, has eliminated himself from active participation in the arguments of the merits of the action by the bringing in of Messrs. Hurd and Strachan, in addition to Donald D. Stark as attorney for Exchange Lemon Products Co.

19. Answering paragraph 25, Respondents state that the records of the proceedings brought up with the petition are not all of the relevant records and proceedings, but are limited and sketchy and inadequate for the issuance of an extraordinary writ of mandamus as prayed in the petition.

Wherefore, Respondents pray that the rule requiring the Respondents to show cause be discharged and the petition be denied and dismissed.

Dated: November 2, 1955.

Wm. Howard Nicholas,
Attorney for Respondents by Appointment pursuant to a Resolution of the Los Angeles Bar Association.

Nicholas & Mack,
Of Counsel.

State of California, County of Los Angeles—ss.

Wm. Howard Nicholas, being first duly sworn, deposes and says:

That he is the attorney for the Respondents in the above proceedings and makes this verification for the Respondents; that he has read the foregoing return and answer to the petition for writ of mandamus and knows the contents thereof; that the same is true according to the information and belief of affiant, and affiant's information and belief are based upon some of the records included in the above proceedings and on proceedings, files, and records of the case of *Winckler v. Sunkist* in the United States District Court for the Southern District of California.

WM. HOWARD NICHOLS

Subscribed and sworn to before me this 2nd day of November, 1955.

GRACE B. HUNDLEY,
Notary Public in and for said City and State.

No. 14894

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
MELVILLE C. WILLIAMS,
for Writ of Mandamus.

Respondents' Brief Opposing Petition for Writ of Mandamus and in Support of Motion to Dismiss and to Discharge Rule to Show Cause.

Statement of the Case.

Respondents do not accept the statement of the case presented by Petitioner in certain material particulars hereinafter indicated and also make the following additional statement:

Pursuant to order dated June 16, 1952, Petitioner was admitted to practice in the District Court of the United States for the Southern District of California for the case of *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., Exchange Orange Products Co., Exchange Lemon Products, et al.,* No. 13788, only. Petitioner thereafter acted as lead and chief counsel for Exchange Lemon Products Co. along with the firm of Clayson, Stark & Rothrock and Donald D. Stark, attorneys who are members of the State Bar of California and regularly admitted to the Bar of the Respondent

Court. Petitioner gave no indication and made no statement at any time to the Respondent Court that he was not to try said action, until Petitioner mentioned it incidentally on May 27, 1955, shortly before the date set for the trial. Mr. Ross C. Fisher, a member of the State Bar of California and of the Bar of the Respondent Court and counsel for Exchange Orange Products Co. and Sunkist Growers, Inc., stated to the Court on June 1, 1955, that it had been decided by his clients some time in March of 1955 that Mr. Ferris E. Hurd of Chicago, Illinois, a non-member of the Bar of the Respondent Court, would be the lead trial counsel for Exchange Orange Products Co. and Sunkist Growers, Inc., but that Mr. Fisher would also continue to participate in the trial of the cause.

On or about October 18, 1955, Ferris E. Hurd and Thomas C. Strachan, Jr., of Chicago, Illinois, members of the firm of Pope & Ballard of that City, were permitted to associate with local counsel and appear and participate in the trial of said case as attorneys for all defendants, including said Exchange Lemon Products Co.

During the pendency of said cause, the plaintiff filed a petition under Chapter 10 of the Bankruptcy Act and the trustee intervened as the party plaintiff. The sole asset available to the trustee was the sum of $2,500.00. Petitioner, while acting as counsel for defendant Exchange Lemon Products Co. in the proceedings before the Respondent Court, resorted to dilatory and attrition tactics, failed to enter into reasonable stipulations as to facts, and obstructed reasonable progress in pre-trial proceedings before the Respondent Court.

During a pre-trial conference on May 27, 1955, and when the trial of the case was set for July 5, 1955, Petitioner announced that he intended to make a Motion to Dismiss the case and a Motion for Summary Judgment, and otherwise obstructed the pre-trial proceedings and orderly settling of issues and non-disputed facts as requested by the Court. Said actions, omissions, and procedures followed by Petitioner resulted in the obstruction of the orderly disposition of Respondent Court's work and oppression to opposing counsel to such a degree that the attorney for the trustee, William C. Dixon, advised the Court on June 1, 1955, that he could come to no other conclusion than to request permission of the Court to be relieved from further handling of the case.

Petitioner's demeanor, methods, and actions interfered with the orderly administration of justice in the Respondent Court and prevented the expeditious trial of the case when set and resulted in the necessity of further continuance of both the pre-trial conference and the trial date. Petitioner's attitude as such counsel caused the Court to conclude that the case was being defended by attrition, by grinding down, by wearing out, by needless multiplying of so-called issues, by splitting issues into as many small parts as possible, by all means that could be resorted to for delay in the arrival at a pre-trial stipulation of facts and a brief statement of issues, to eventually delay the trial of the action, all to make is impossible for the trustee plaintiff litigant to pursue said action. (App. p. 73. See also App. pp. 1-178, on March 8, 1954, and March 11, 1954.]

The proposed stipulations of facts which Petitioner refused to enter into were drawn generally from defen-

dants' answers to interrogatories and defendants' answers to requests for admission in this cause. (App. p. 93.)

Ross C. Fisher, attorney for the other defendants, stated on June 1, 1955, that William C. Dixon, attorney for the trustee, had not engaged in dilatory tactics in connection with the pre-trial stipulation. (App. p. 83.)

At the hearing on June 1, 1955, and at the request of Mr. Fisher and concurred in by Petitioner, the Respondent Court continued the matter until the following morning, June 2, 1955, for further hearing and proceedings.

On the second day of the hearing, June 2, 1955, pertaining to Petitioner's conduct, Petitioner requested a further continuance to prepare his defense, after evidence was received and arguments of counsel made and after the Respondent Court had indicated its intended ruling and order. (App. p. 87.) As a result of Petitioner's conduct the trial date was continued and reset for November 15, 1955. Since the appearance of said Ferris E. Hurd and Thomas C. Strachan, Jr., good progress has been made in the settling of said pre-trial stipulations.

The Respondent Court's order was based upon the record of these proceedings, what has happened, what the Respondent Court observed in open court, Petitioner's sworn testimony before Respondent Court, and related matters. (App. p. 96.)

Questions Involved.

1. Has the Respondent Court the power to revoke the limited permission given under its rules to a non-resident attorney to appear and participate in one case only?

2. If such power exists, was it properly exercised by the Respondent Court in this matter?

3. If the Respondent Court did not properly exercise its judicial power, was there such an arbitrary and despotic abuse of discretion sufficient to justify the granting of the extraordinary remedy of mandamus?

4. Are the matters raised by the petition for Writ of Mandamus moot by virtue of the admitting of Ferris E. Hurd and Thomas C. Strachan, Jr., as attorneys for all defendants, including Exchange Lemon Products Co.?

5. Will mandamus issue where an appeal is pending in this Honorable Court on the same matter?

6. Will Mandamus issue on a partial record in this matter?

Summary of Argument.

A writ of mandamus will not be ordered to restore to a non-resident attorney limited permission to appear and practice in one case only where such permission was revoked by order of the court in the exercise of its judicial discretion for the misconduct charged on the court's own motion to have taken place in the presence of the court. The special permission under local Rule 1(b) is a courtesy and accommodation extended to non-resident attorneys and does not create vested rights tantamount to regular admission to the bar of such court. The right of non-residents to practice is hedged and

limited by conditions, such as having a resident associate attorney on whom notices and orders may be served. The Respondent Court properly exercised its judicial discretion in revoking such limited permission to appear and practice in one case only, where a non-resident chief defense attorney previously granted such limited permission to appear and practice refused, in the presence of the court, to enter into a reasonable stipulation of facts at a pre-trial conference and failed to advise the Respondent Court until the eve of trial that such attorney did not intend to try the case and that it was known from the beginning that two other members of such attorney's firm, also non-residents, would make Motions for Permission to Practice and would try the case, and where such attorney also had made Motions to Make More Definite and Certain, a Motion to Strike and various motions for inspection, admissions, and interrogatories, and particularly where the court observed the attitude and demeanor of such non-resident attorney at the pre-trial hearing on the eve of trial stating that he intended to Move to Dismiss and to Move for Summary Judgment, and based upon all of the records, files, proceedings, testimony, and demeanor of such attorney at all hearings, and where the court, as a result of all of such things, concluded that such attorney had employed and was employing methods of attrition and delay to wear down the attorney and trustee for the plaintiff.

The Petitioner was given a reasonable opportunity to answer the charges of attrition and delay and of improperly concealing from the Court that it was never intended that he try the case. Petitioner was given an opportunity to answer such charges with counsel by the continuance of the hearing on the matter until

the following day, June 2, 1955, at which time Petitioner did purport to answer the charges made against him by William C. Dixon and the Court, and Petitioner was represented by Donald D. Stark and Ross C. Fisher, and evidence, both oral and documentary, having been offered and received and the matter argued by counsel for Petitioner, and the Court, in the exercise of its judicial discretion, properly denied the motion for further continuance by Petitioner and ordered the revocation of his limited permission to practice. The action of the Respondent Court was based upon occurrences in open court and in its presence.

The order complained of is presumed to be reasonable and proper in the absence of clear and unmistakable showing of an arbitrary and despotic abuse of judicial power. The Appellate Court will not review a discretionary ruling on a writ of mandate where there is a conflict of evidence and where there is an incomplete record before the Appellate Court.

Since the Petitioner has taken an appeal from the order revoking his limited permission to appear and practice in one case only and such appeal is still pending, mandamus will not lie to review the action of the Respondent Court, particularly where Petitioner has effectively eliminated himself from appearing and participating in the trial by the admission of two other attorneys from his firm for such purpose, making a total of three attorneys of record in addition to Petitioner, whereas the local rule, 1(e)5, places a limit of two attorneys on each side. The matters raised by the petition for writ of mandamus were rendered moot by the orders admitting Ferris E. Hurd and Thomas C. Strachan, Jr., as counsel for all defendants in said case.

ARGUMENT.

POINT ONE.

A Non-Resident Attorney Given Limited Permission to Appear and Practice in One Case Only Enjoys Merely a Privilege Subject to Revocation by the District Court.

Since Rule 1(b) of the local Rules of the District Court for the Southern District of California does not give a non-resident lawyer permission to practice as a matter of right, but merely allows such non-resident lawyer the privilege in the form of a limited permission resting on the sound discretion of the Court, the same rule of sound judicial discretion should apply to an order revoking such limited permission for occurrences in the presence of the Court. A non-resident lawyer admitted under such Rule 1(b) is not subject to discipline by the organized State Bar of the State of California, not being a member thereof. The non-resident lawyer frequently is untrained in California substantive law, although since the case of *Erie Railroad v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the District Courts must apply the local substantive law. In order for the District Court to efficiently and properly control proceedings, the judge must be permitted to exercise judicial discretion to set aside such order for limited permission to appear and practice in one case only for occurrences in open court; otherwise there would be no way to regulate or control the conduct of such non-resident lawyers short of summary contempt. The remedy of summary contempt is harsh and ineffective to secure performance of affirmative acts, such as cooperating with the Court and opposing counsel in reaching reasonable stipulations of fact and limiting issues, where such out-of-state lawyer

is only within the district of the Court eighty-seven days out of a period of more than three years since the action was filed. If the limited permission be treated as something more than a privilege granted at the discretion of the District Court under Rule 1(b) or a similar rule, District Courts will have to be extremely cautious in admitting out-of-state lawyers in order to control the proceedings in their Courts; and if it were to be determined that a "full-blown" trial be required to revoke an order for such limited permission of a non-resident lawyer to appear and practice, it would in effect be to require the Court to become a party litigant as well as the judge and would make a mockery out of the administration of justice in our District Courts, particularly in cases like this one, where the occurrences were all in the presence of the Court.

An out-of-state attorney has no absolute right to be admitted to practice in other courts.

6 C. J. p. 573, Attorney and Client, Sec. 20;

7 C. J. S. p. 723, Attorney and Client, Sec. 15(b).

Judge Sawtelle, when on the District Court of Arizona, later a judge of this Circuit, stated in *Rouiller v. A & B Schuster Co.* (D. C. Ariz., 1914), 212 Fed. 348 at 349:

> "While it is within the power of the court not to permit one not a member of its own Bar to appear before it, it is also a matter resting in the discretion of the court, and it may as it sees fit, allow attorneys of other courts to appear and conduct cases before it."

If there was no right on the part of Petitioner to be admitted specially in the first instance, it is difficult to see how his privilege grows and increases merely because

the Court granted his motion. This would be like pulling oneself up by his boot straps.

Assuming *arguendo* that even though the order of the District Court was based upon happenings in his presence, the law requires that the Petitioner have notice of the Court's proposed order, this requirement was fully satisfied.

The District Court informed Petitioner in detail of the order he proposed to make (App. pp. 72-78) and the District Court set forth the three grounds for the proposed order, which were the same three grounds upon which the order was eventually based:

(1) That Petitioner was a member of the Bar at sufferance by the District Court (App. p. 72);

(2) The Court stated that from what he had "seen and heard" in the court room, and relying on the record on "whatever record there is in this case to date" that Petitioner had defended the case by attrition and delay (App. p. 73);

(3) That Petitioner had failed to reveal to the Court that it was intended at all times that Mr. Hurd be chief trial counsel and this fact had not been disclosed to the Court (App. pp. 77-78).

The Court further said, "I want to give you a chance to be heard, as a matter of fact if you want to think about this until tomorrow morning you may do so, I am not going to take precipitous action in the matter." (App. p. 78.)

Petitioner was given a continuance to the following day and on June 2, 1955, was given an adequate hearing.

The Court then heard from various counsel in the case, including the Petitioner, Williams. (App. pp. 78-86.)

Mr. Fisher, representing Exchange Orange Products stated, "I would like it if the matter could be continued until tomorrow and go into it at that time." (App. p. 86.)

> "The Court: . . . If you want the matter to go over until 10 o'clock tomorrow morning I will be glad to do that Mr. Fisher.
>
> Mr. Fisher: I would prefer it.
>
> Mr. Williams: I would, also, like it, of course, your Honor." (App. p. 87.)

The matter was then continued until the following morning.

On the following day, June 2, 1955, the Petitioner asked the Court, "to postpone entering an order and further consideration of this matter until Tuesday of next week. The General Manager of Exchange Lemon Products is not in California, he will be in Chicago and I would like to have an opportunity to talk with him and also talk to my partners about this matter." (App. pp. 88-89.)

The express purpose of the requested continuance it will be noted, was not a request to further prepare or to secure counsel. The Court denied the motion. (App. p. 89.)

Mr. Stark, attorney for Exchange Lemon Products Co. then addressed the Court (App. p. 90) and offered in

evidence certain exhibits which the Court received as the Court's Exhibits 1 to 8. (App. pp. 94-95.)

It was following this that for the first time there was mention made of counsel for Williams.

> "Mr. Stark: We hoped there might be an opportunity for Mr. Williams to be heard and present witnesses and evidence on this issue . . . It is Mr. Williams' request that he be entitled to present such a showing and if possible to be represented by counsel of his selection in connection with that showing." (App. p. 95.)

If Stark was not acting as Williams' attorney, then the first request made by Williams for counsel was near the end of the hearing. (App. p. 101.)

> "Mr. Williams: . . . I suggest that the court grant a hearing and right to have counsel to present to the court the full picture of what occurred and how much was accomplished during the negotiations for the stipulation."

Thereafter (App. pp. 102-103) the Court made its ruling.

From the foregoing it will be seen that on page 12 of Petitioner's brief, he has overstated his case. "On June 2 petitioner appeared and requested a continuance, stating he had not had time to employ counsel and he wished to call witnesses and present evidence on the question of his good faith." This occurred at the *very end* of the hearing.

POINT TWO.

The Proceedings on June 1, and June 2, 1955, for the Revocation of the Limited Privilege Granted to Petitioner to Appear and Practice Were Made Only After a Clear and Formal Charge Stated in Open Court, a Continuance to Prepare and an Adequate Hearing.

While formal charges are not indispensable, even in the more serious situation of a disbarment of a regular member of the Bar of the District Court, the Respondent Court in this matter meticulously and most clearly informed the Petitioner of the charges against him and granted a continuance till the following morning to prepare for the further hearing. On the following morning a full hearing commenced, at which such Petitioner was in fact represented by able counsel. There are no specific rules of procedure for handling a hearing of the kind involved in this matter, and the action of the Court was clearly an exercise of reasonable judicial discretion incident in the authority to run his own Court. This was not a criminal proceeding against Petitioner.

Herron v. State Bar (1944), 24 Cal. 2d 53, 147 P. 2d 543, 550;

Prime v. State Bar (1941), 18 Cal. 2d 56, 112 P. 2d 881;

Marsh v. State Bar (1934), 2 Cal. 2d 75, 39 P. 2d 403;

Fish v. State Bar (1931), 214 Cal. 215, 4 P. 2d 937, 940;

In re Vaughan (1922), 189 Cal. 491, 209 Pac. 353, 354, 24 A. L. R. 858.

The rules of practice in disbarment proceedings are more flexible than those prevailing in criminal cases, and a formal charge is not indispensable.

Randall v. Brigham, 7 Wall. 523, 74 U. S. 523, 19 L. Ed. 285;

Thatcher v. United States (6 Cir.), 212 Fed. 801.

The criminal cases holding that a defendant is entitled to counsel of his own choice (*Powell v. Alabama,* 287 U. S. 45), and those cited in Petitioner's brief are not helpful. In this civil matter, the Court made a finding that the parties each had other counsel who were members of the bar of the Court (App. p. 3) and that Exchange Lemon Products Co., whom Petitioner also appeared for, would suffer no prejudice by the order setting aside his limited permission to appear and practice. (App. p. 6.)

The scope of appellate review in disbarment proceedings is limited to the inquiry whether there was an abuse of discretion or grave irregularities.

Ex parte Burr (1824), 9 Wheat. 529, 22 U. S. 529.

The following authorities indicate the extent of notice required and the extent of an attorney's rights or privileges to practice before the Court. It is fundamental that the power to disbar or otherwise discipline an attorney is possessed by all courts which have authority to admit attorneys to practice.

Bradley v. Fisher (1871), 13 Wall. 335, 80 U. S. 335, 20 L. Ed. 646;

Ex parte Robinson (1873), 19 Wall. 505, 86 U. S. 505, 22 L. Ed. 205;

Ex parte Wall (1883), 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552;

Conley v. United States (8 Cir., 1932), 59 F. 2d 929;

In re Fletcher (1939), 71 App. D. C. 108, 107 F. 2d 666;
In re Claiborne (1 Cir., 1941), 119 F. 2d 647;
In re Spicer (6 Cir., 1942), 126 F. 2d 288.

Authorities on the Question of Notice.

Ex parte Secombe (1856), 19 How. (60 U. S. 9), was one of the earliest authorities on the question of notice. The Supreme Court of the Territory of Minnesota had removed Secombe from his office as an attorney and counsellor. He petitioned in the Supreme Court of the United States for writ of mandamus directed to the judges of the Supreme Court of the Territory of Minnesota, commanding them to vacate and set aside their order.

At page 15, the Court said:

". . . The statute of Minnesota, under which the court acted, directs that the proceedings to remove an attorney or counsellor must be taken by the court, on its own motion, for matter within its knowledge; or may be taken on the information of another. And, in the latter case, it requires that the information should be in writing, and notice be given to the party, and a day given to him to answer and deny the sufficiency of the accusation, or deny its truth.

"In this case, it appears that the offences charged were committed in open court, and the proceedings to remove the relator were taken by the court upon its own motion. And it appears by his affidavit that he had no notice that the court intended to proceed against him; had no opportunity of being heard in his defence, and did not know that he was dismissed from the bar until the term was closed, and the court had adjourned to the next term . . .

"The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether

this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject-matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding. . . ."

Randall v. Brigham (1868), 7 Wall. (74 U. S.) 523, was an action for damages against a judge for allegedly unlawfully removing an attorney from the bar. The Court said, page 540:

". . . It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. *All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of* the charges made and opportunity afforded him for explanation and defence. . . ."

Bradley v. Fisher (1871), 13 Wall. (80 U. S.) 335, states at page 354:

". . . If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The Criminal Court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is

a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And, *except where matters occurring in open court, in presence of the judges, constitute the grounds of its action,* the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence. . . ."

In re Paschal (1870), 10 Wall. 10 (77 U. S.) 483 at 491:

". . . The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. *For such improper conduct the court may entertain summary proceedings* by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, *or discharge them from the functions of their offices,* or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of jurisdiction thus exercised is the alleged misconduct of the officer. . . ."

In re Claiborne (C. A. 1, 1941), 119 F. 2d 647 at 650:

". . . The proceedings for such discipline need not comply with all the formalities of process or other trial procedure. The informality by which action is taken, the charges made, or notice is given to the attorney charged with misconduct, will not invalidate the proceedings. It is sufficient if the

attorney has notice of the charges against him and an opportunity to prepare and present his defense. *Ex parte* Wall, *supra,* 107 U. S. at 271, 2 S. Ct. 569, 27 L. Ed. 552; Randall v. Brigham, 1868, 7 Wall. 523, 539, 19 L. Ed. 285; United States v. Parks, C. C. Col. 1899, 93 F. 414; *cf.* Conley v. United States, *supra,* 59 F. 2d at 935; United States v. Hicks, 9 Cir., 1930, 37 F. 2d 289, 292 . . ."

Quoting from the *Claiborne* case with approval, is *Wilbur v. Howard* (D. C. Ky., 1947), 70 Fed. Supp. 930 at 932; reversed on grounds arising out of the death of the attorney, *Howard v. Wilbur* (6 Cir., 1948), 166 F. 2d 884.

Laughlin v. Eicher (C. C. A. D. C. 1944), 145 F. 2d 700 at 702:

". . . Respondent might, of course, have punished petitioner for this contempt. But petitioner had already been punished twice, once by respondent and once by another judge, for contemptuous conduct in the trial. Respondent turned from punishment to prevention. He might have instituted proceedings for petitioner's disbarment or suspension from practice. He chose a more lenient and more promptly effective course. He exercised only the elementary right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety. . . ."

In *Herman v. Acheson* (D. C. Dist. Col., 1952), 108 Fed. Supp. 723, the right of plaintiff, an attorney to practice before the International Claims Commission of the United States was revoked by the Commissioner and affirmed by the defendant Acheson, Secretary of State. He sought an injunction. The Court said, page 726:

". . . He apparently, however, proceeds on the theory at variance with fact that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon the formality of allegations akin to indictment. The fact is that such proceedings are often instituted upon information and as the Supreme Court of the United States has said, in Randall v. Brigham, in 1868, 7 Wall. 523, 540, 74 U. S. 523, 540, 19 L. Ed. 285, 'or from what the Court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. *All that is requisite to their validity is that, when not taken for matters occurring in open court in the presence of the judges, notice should be given* to the attorney of the charges made and opportunity afforded him for explanation and defense. . . .'"

In *Kelley v. Boettcher* (8 Cir., 1897), 82 Fed. Rep. 794 at 797, the 8th Circuit struck a scurrilous brief from the files, ordered the name of the attorney stricken from the record as solicitor and counsel for appellant and stated that "he will no longer be heard in this case either orally or by brief."

The Petitioner, even if it were to be held that he had vested rights as a member of the Bar of Respondent Court, was given adequate notice and an adequate hearing to protect such asserted rights. *A fortiori,* in this matter, where Petitioner was appearing under a permissive rule only and was charged with misconduct in the presence of the Court at a pretrial conference as well as other hearings before the Court, Petitioner was more than fairly treated in the proceedings for the revocation of his said permissive right to appear and practice before the Respondent Court.

POINT THREE.

The Petition Herein Fails to Show Any "Arbitrary and Despotic" Abuse of Discretion Sufficient to Justify Setting Aside the Order of the Court Dated July 26, 1955, Filed July 27, 1955, Setting Aside Petitioner's Limited Permission to Appear and Practice in One Case Only.

The petition and exhibits are incomplete, much of the testimony at prior hearings not having been written up or otherwise included in the appendix to petition. The Court based its order upon the entire record and all court appearances before the Respondent Court. The appellate court will presume that the record omitted by the Petitioner is adverse and sufficient to sustain the order. The record must positively show the alleged error.

Balestreri v. United States (9 Cir., 1955), 224 F. 2d 915, 918.

There is no sufficient showing in the petition or the exhibits appended thereto or in the record to establish a right to the extraordinary writ of mandamus by a clear abuse of discretion or "usurpation of judicial power" by the revoking of the order of June 16, 1952, for the special permission to practice granted Petitioner. The Petitioner is remitted to his ordinary remedy on his pending appeal where the action of the Respondent Court is not clearly "arbitrary and despotic."

In re Spears (C. A. Mich), 185 F. 2d 456;
Cert. den. 71 S. Ct. 616;
341 U. S. 910;
95 L. Ed. 1347.

In re Fisher (C. A. Ill., 1950), 179 F. 2d 361;
Cert. den. 71 S. Ct. 59;
340 U. S. 825;
95 L. Ed. 606.

Petitioner Williams Has Not Sent Up the Entire Record and His Point No. 3 Need Not Be Considered by This Court.

In his brief (p. 13) Williams states that there has been filed as part of his petition as an appendix, "all portions of the proceedings in the District Court which are relevant to petitioner's conduct before that court." This court is not bound by his conclusion. The entire record should be before the court.

Finding No. VIII found that

> "While admitted specially to the bar of this court and while acting as chief trial counsel for defendant, Exchange Lemon Products Co. in proceedings before this court, Melville C. Williams has engaged in practices of attrition and delay—which have interfered with the expeditious preparation of the . . . case for trial . . . (and) interfered with the administration of justice and the expenditious trial of the . . . case." (App. p. 5.)

At the time the Court stated the order it proposed to make (June 1, 1955, App. pp. 72-78) and before it made the ruling (June 2, 1955; App. p. 102) or the order (July 26, 1955; App. p. 7) the court said (App. pp. 72-73):

> "and I conclude from the entire record to date, and from what I have seen and heard—and these are in a way intangible, but they are impressions that a judge gets, I can't put my finger on any part of them, but I rely on whatever record there is of this case to date for my conclusions that your attitude has been to see that this case was tried by attrition, by the grinding down, by the wearing out, by the multiplying of issues, by the splitting of issues into as many small parts as possible, by all means that could be attained to detain an arrival at a pretrial stipulation

of facts and a brief statement of issues, to eventually delay the trial of the action, to make it impossible for the trustee, plaintiff litigant, to pursue this action."

The respondent court doesn't know if all proceedings were written up by the reporter, but has possession of the following transcripts with dates and pages as indicated, of which Williams has presented as his record, only a part:

Date	Pages	Presented in Williams Record in Appendix
Judge Carter		
3-8-54 and 3-11-54	1-178	p. 6, line 6, to p. 8, line 22 p. 21, lines 13-22 p. 50, lines 13-23 p. 60, line 18, to p. 63, line 21 p. 122, line 20, to p. 123, line 22 p. 130, line 23, to p. 132, line 6 p. 157, line 7, to p. 164, line 15 p. 170, line 1, to p. 172, line 20
5-10-54	1-28	p. 1, line 2, to p. 6, line 18 p. 21, line 25, to p. 23, line 2 p. 26, line 18, to p. 27, line 7
11-24-54	1-30	p. 22, line 17, to p. 25, line 8 p. 27, line 7, to p. 28, line 5
2-14-55	1-56	None
5-26-55	1-25	
5-27-53	26-124	p. 92, line 1, to p. 8, line 24
5-31-55	125-193	p. 121, line 12, to p. 124, line 14
6- 1-55	1-53	All pp. 1-53
6- 2-55	54-95	p. 55, line 8, to p. 73, line 14 p. 79, line 23, to p. 82, line 9 p. 92, line 7, to p. 94, line 14

It would be a manifest injustice to decide the case presented on *what petitioner thinks was material,* when the court based its action on the whole record.

As in any proceedings attacking findings, the party seeking review must send up the entire record. Otherwise it will be presumed that the omitted portion, supports the findings.

> *Balestreri v. United States* (9 Cir., 1955), 224 F. 2d 915, 918.

It rests exclusively with the courts to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, is not arbitrary and despotic but it is the duty of the Court to exercise it by sound and just judicial discretion.

> *Ex parte Secombe* (1856), 19 How. 9, 13.

The method of practice by which the court strikes an attorney's name from the rolls is not jurisdictional. The rule has been stated in this circuit as follows.

> "Mandamus will lie to require an inferior court to restore an attorney as a practitioner when the court has exceeded its jurisdiction in striking his name from the roll, but that the manner in which its jurisdiction is exercised—that is to say, the method of practice by which the court's discretion or judicial function is invoked—is not jurisdictional. For errors of the court committed in the requirement of jurisdiction, so that it acts judicially or in the exercise of a sound discretion in determining as to the sufficiency of the mode of procedure, its judgment will not be disturbed on a writ of mandamus."
>
> *Barnes v. Lyons* (9th Cir., 1911), 187 Fed. 881, 884.

The Supreme Court recognized that jurisdiction rests exclusively with the District Court and stated that it cannot review on mandamus an order removing an attorney, for matters occurring in the presence of the Court, saying:

> "In proceeding to remove the relator, the court was necessarily called on to decide whether, in a case where the offense was committed in open court, and the proceeding was had by the court on its own motion, the statute of Minnesota required that notice should be given to the party, and an opportunity afforded him to be heard in his defense. The court, it seems, were of opinion that no notice was necessary, and proceeded without it, and whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding (mandamus)."
>
> *Ex parte Secombe* (1856), 19 How. 9, 15.

See:

> *Ex parte Burr* (1824), 9 Wheat. 529.

Bankers Life & Casualty Co. v. Holland, Chief Judge, et al. (1953), 346 U. S. 379, at 382-383:

> ". . . As was pointed out in Roche v. Evaporated Milk Assn., 319 U. S. 21, 26 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it

was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex parte* American Steel Barrel Co., 230 U. S. 35, 45-46 (1913); *Ex parte* Roe, 234 U. S. 70, 73 (1914) . . ."

At page 383:

". . . The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consolidated Mines v. United States, 325 U. S. 212, 217 (1945). This is not such a case . . ."

At page 384:

". . . We adhere to the language of this Court in *Ex parte* Fahey, *supra,* at 259-260:

" 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . As extraordinary remedies, they are reserved for really extraordinary causes.'

"Affirmed."

In re Mary Hatch Riggs (1909), 214 U. S. 9, at 14-15:

> ". . . We rest our conclusion upon the proposition that the District Court in adjudicating the tunnel company a bankrupt was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication cannot be reviewed by proceedings in mandamus. *In re* Pollitz, 206 U. S. 323, 331; *In re* Winn, 213 U. S. 458.
>
> "The rule is discharged and the writ of mandamus denied."

To admit applicants to practice law is judicial, not legislative, and vested in the courts only.

Laughlin v. Clephane (D. C., D. C., 1947), 77 Fed. Supp. 103;

In re Shorter (D. C. Ala., 1865), 22 Fed. Cas. No. 12.

POINT FOUR.

The Matters Raised by the Petition for Writ of Mandamus Were Rendered Moot by Virtue of the Order Admitting Ferris E. Hurd and Thomas C. Strachan, Jr., in Said Cause as Attorneys for All Defendants, Including Exchange Lemon Products Co.

Rule 1(e)5 reads as follows:

> "Only one attorney on each side may examine or cross-examine a witness, and not more than two attorneys on each side may argue the merits of the action unless the court otherwise permits."

The Petitioner is already disqualified from appearing and participating in the case by virtue of said Rule without the special permission of the Court. Such permission has not been given.

POINT FIVE

Mandamus Will Not Issue Pursuant to This Petition by Reason of Petitioner's Appeal Now Pending in This Matter.

Since the writ of mandamus is an extraordinary remedy, the Petitioner has shown by his own election that his remedy on appeal is adequate. He is also now disqualified from appearing and participating by virtue of the fact that his partners, Ferris E. Hurd and Thomas C. Strachan, Jr., have been permitted to appear and participate in the case on behalf of all defendants, thus exceeding the limit of two under said Rule 1(e)5 of the District Court of the United States for the Southern District of California.

Wherefore, Respondents respectfully urge that this Honorable Court discharge the rule ordering Respondents to show cause and dismiss the petition for writ of mandamus.

Dated: November 2, 1955.

Wm. Howard Nicholas,

Attorney for Respondents by Appointment Pursuant to a Resolution of the Los Angeles Bar Association.

Nicholas & Mack,

Of Counsel.